Seetha a/p Vijayaratnam v Vicknesh a/l Visvalingam

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02(IM)-2071 OF 2011
SULONG MATJERAIE, MOHD HISHAMUDIN AND ABDUL WAHAB PATAIL JJCA
15 APRIL 2013

Family Law — Financial obligation — Maintenance order — Maintenance order — Variation of — Appellant/wife's appeal against second variation order — Whether previous maintenance order based on misrepresentations — Whether High Court judge power to vary previous maintenance order made under different legislation — Whether appellate intervention required — Law Reform (Marriage and Divorce) Act 1976 s 83

The appellant/wife ('AW') and respondent/husband ('RH'), who had been married from January 1999 had been living apart since November 2007. On 4 June 2008, the AW commenced an action for maintenance under s 3 of the Married Women and Children (Maintenance) Act 1950 ('the MWCA') against the RH. In her affidavit the AW had stated that she was earning a monthly salary of RM1,748.25 as an executive officer with RHB Bank and that the RH had been maintaining her until 1 January 2007. The RH, a gynaecological oncologist at the KL Hospital was earning a monthly salary of RM9,764.30 and an additional sum of RM2,700 per month from his part-time job. The magistrate hearing the maintenance application ordered the RH to pay the AW maintenance in the sum of RM3,700 per month and arrears of maintenance from 1 January 2007 to the date of this order ('the maintenance order'). The RH appealed against the maintenance order made by the magistrate's court. On 30 January 2009, the High Court judge hearing the appeal reduced the monthly maintenance payment to RM2,000 per month and also ordered the RH to pay the AW arrears of maintenance payments in the sum of RM25,000 ('the first variation order'). On 27 July 2009, the RH filed a divorce petition against the AW seeking for dissolution of the marriage. At the same time the RH filed an application pursuant to s 83 of the Law Reform (Marriage and Divorce) Act 1976 ('Act') seeking to set aside or reduce the first variation order on the grounds that the AW had misrepresented her monthly salary and that the RH had maintained her during the period they were living together. The High Court judge found that there were misrepresentations made by the AW at the maintenance proceedings before the magistrate' court and allowed the RH's application to vary the first variation order ('the second variation order'). However, the second variation order did not state in what manner the first variation order was to be varied. This was the AW's appeal against the second variation order. In this appeal the AW submitted that the High Court judge

had no power to vary the first variation order, because the maintenance order and the first variation order were made under the MWCA, while the second variation order was made another legislation, ie the Act. The AW also submitted that the issues now raised by the RH were not new issues but issues that had already been ventilated before the magistrate's court during the maintenance proceeding.

Held, dismissing the appeal with costs:

(1) Since there was a petition for divorce pursuant to s 83 of the Act, the maintenance order could be varied provided it was proven that the order was based on any misrepresentation or mistake of fact or material change in circumstances (see para 11).

(2) A strict application of the law that since the maintenance order had been obtained under the MWCA, a setting aside or variation could only be made under the same Act and not another legislation, even though there was a divorce petition pending, would impose unnecessary technicalities upon individuals. As an application for maintenance was made by individuals who were entitled to and needed financial support in the form of maintenance, a more liberal application was to be preferred to facilitate justice rather than handicap it. In the circumstances, there was no error that demanded appellate intervention (see paras 12 & 14).

(3) (per **Mohd Hishamudin JCA, dissenting**) Under s 83 of the Act the High Court judge had the power to vary the previous maintenance orders, which were made under a different legislation, namely the MWCA. Be that as it may, in the circumstances of the present case, the exercise of that power was improper, in that the second variation order was vague. The second variation order should have been specific and ought to have stated in what manner the first variation order was to be varied. On this ground alone the AW's appeal should have been allowed (see paras 45–46 & 48).

(4) (per **Mohd Hishamudin JCA, dissenting**) Further, the RH's application to vary the first variation order by invoking s 83 of the Act went against the principle of res judicata. In fact it would be a fair inference to make that the RH's long and unexplained delayed application under s 83 of the Act was not bona fide (see para 50).

[Bahasa Malaysia summary

Perayu/isteri ('PI') dan responden/suami ('RS'), yang telah berkahwin dari Januari 1999 telah hidup berasingan sejak November 2007. Pada 4 Jun 2008, AW telah memulakan tindakan untuk mendapat nafkah di bawah s 3 Akta Perempuan Bersuami dan Anak-Anak (Nafkah) 1950 ('APBAA') terhadap RS. Dalam afidavitnya PI menyatakan bahawa dia berpendapatan sebulan gaji sebanyak RM1,748.25 sebagai pegawai eksekutif Bank RHB dan bahawa RS

telah memberi nafkahnya sehingga 1 Januari 2007. RS, seorang pakar onkologi sakit puan di Hospital KL berpendapatan gaji bulanan sebanyak RM9,764.30 dan jumlah tambahan RM2,700 sebulan daripada kerja sambilannya. Majistret yang mendengar permohonan nafkah telah memerintahkan RS membayar kepada PI nafkah sejumlah RM3,700 sebulan dan tunggakan nafkah dari Januari 2007 hingga tarikh perintah ini ('perintah nafkah'). RS merayu terhadap perintah nafkah yang dibuat oleh mahkamah majitret. Pada 30 Januari 2009, hakim Mahkamah Tinggi yang mendengar rayuan itu telah mengurangkan bayaran nafkah bulanan kepada RM2,000 sebulan dan juga memerintahkan RS membayar kepada PI tunggakan bayaran nafkah berjumlah RM25,000 ('perintah perubahan pertama'). Pada 27 Julai 2009, RS telah memfailkan petisyen penceraian terhadap PI dengan memohon pembubaran perkahwinan. Pada masa sama RS telah memfailkan permohonan menurut s 83 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut') memohon untuk diketepikan atau dikurangkan perintah perubahan pertama atas alasan bahawa PI telah memberi gambaran yang salah tentang gaji bulanannya dan bahawa RS telah memberi nafkah kepadanya sepanjang tempoh mereka hidup bersama. Hakim Mahkamah Tinggi mendapati bahawa terdapat gambaran yang salah dibuat oleh PI dalam prosiding nafkah di hadapan mahkamah majistret dan membenarkan permohonan RS untuk mengubah perintah perubahan pertama ('perintah perubahan kedua'). Walau bagaimanapun, perintah perubahan kedua itu tidak menyatakan dalam cara apa perintah perubahan pertama perlu diubah. Ini adalah rayuan PI terhadap perintah perubahan kedua itu. Dalam rayuan ini, PI berhujah bahawa hakim Mahkamah Tinggi tiada kuasa untuk mengubah perintah perubahan pertama, kerana perintah nafkah dan perintah perubahan pertama itu telah dibuat di bawah APBAA, manakala perintah perubahan kedua telah dibuat oleh perundangan iaitu Akta tersebut. PI juga berhujah bahawa isu kini ditimbulkan oleh PI bukan isu-isu baru tetapi isu-isu yang telah pun dikemukakan di hadapan mahkamah majistret semasa prosiding nafkah.

Diputuskan, menolak rayuan dengan kos:

(1) Oleh kerana terdapat petisyen untuk peceraian menurut s 83 Akta tersebut, perintah nafkah boleh diubah dengan syarat ia dapat dibuktikan bahawa perintah itu berdasarkan apa-apa gambaran salah atau kesilapan fakta atau perubahan besar dalam keadaan berikut (lihat perenggan 11).

(2) Pemakaian undang-undang secara ketat di mana perintah nafkah telah diperoleh di bawah APBAA, suatu penepian atau perubahan hanya boleh dibuat di bawah Akta yang sama dan bukan perundangan lain, meskipun terdapat petisyen perceraian yang belum selesai, akan menimbulkan masalah teknikal yang tidak wajar terhadap individu-individu berkaitan. Oleh kerana permohonan untuk nafkah telah dibuat oleh

individu-individu yang berhak ke atas dan yang memerlukan sokongan kewangan dalam bentuk nafkah, permohonan yang lebih liberal harus dipilih untuk memudahkan pelaksanaan keadilan dan bukan untuk menghalangnya. Dalam keadaan berikut, tiada kesilapan yang mewajarkan campur tangan pihak rayuan (lihat perenggan 12 & 14).

(3) (oleh **Mohd Hishamudin HMR, menentang**) Di bawah s 83 Akta tersebut hakim Mahkamah Tinggi mempunyai kuasa untuk mengubah perintah-perintah nafkah sebelumnya, yang dibuat di bawah perundangan berbeza, seperti APBAA. Oleh demikian, dalam keadaan kes ini, penggunaan kuasa itu tidak wajar, kerana perintah perubahan kedua tidak jelas. Perintah perubahan kedua patut lebih spesifik dan patut menyatakan cara apa perintah perubahan pertama perlu diubah. Atas alasan ini sahaja rayuan PI patut dibenarkan (lihat perenggan 45, 46 & 48).

(4) (oleh **Mohd Hishamudin HMR, menentang**) Selanjutnya, permohonan RS untuk mengubah perintah perubahan pertama dengan menggunakan s 83 Akta tersebut adalah bertentangan prinsip res judicata. Bahkan ia suatu inferens yang adil untuk dibuat bahawa permohonan RS di bawah s 83 Akta tersebut yang lama dan lewat tanpa penjelasan itu bukan bona fide (lihat perenggan 50).]

Notes

For a case on maintenance, see 7(2) *Mallal's Digest* (4th Ed,2013 Reissue) para 4165.

Cases referred to

Gisela Gertrud Abe v Tan Wee Kiat [1986] 2 MLJ 297; [1986] CLJ (Rep) 133, SC (refd)

Nau Chu Chiong @ Nau Choo Chiong v Lina Soo [2008] 3 MLJ 42, CA (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 s 83
Married Woman and Children (Maintenance) Act 1950 ss 3, 6

Appeal from: Divorce Petition No 33–244 of 2009 (High Court, Seremban)

T Gunaseelan (Gunaseelan & Associates) for the appellant.
Ashok Kandiah (Kandiah & Partnership) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] It was recorded at the beginning of the hearing that the parties have

agreed that the decision in this appeal will bind the motion fixed for hearing on 2 March 2012 and the applicant therein undertakes to file a notice of discontinuance.

[2] We note a sealed order had not been extracted. However, adopting the view that since the unsealed order had been signed by the respondent/petitioner/husband Vicknesh a/l Visvalingam ('the husband') and its terms not disputed, it was deemed to have been approved after 24 hours, and the appeal could proceed to be heard.

[3] The appellant herein and the respondent in the High Court is the then wife ('the wife').

[4] The husband had applied before the High Court for orders as follows:

a) Membatalkan perintah bertarikh 30.1.2009 yang dibuat oleh Mahkamah Tinggi Malaya di Seremban di bawah Rayuan Sivil No. 11-14-2008;

b) Secara alternative Perintah bertarikh 30.1.2009 oleh Mahkamah Tinggi Malaya di Seremban di bawah Rayuan Sivil No. 11-14-2008 diubah setakat mana bahawa pembayaran nafkah kepada Responden dikurangkan kepada suatu jumlah yang dianggap adil dan berpatutan oleh Mahkamah Yang Mulia ini;

c) Bahawa Perintah bertarikh 30.1.2009 oleh Mahkamah Tinggi Malaya di Seremban di bawah Rayuan Sivil No. 11-14-2008 tersebut digantungkan sementara menunggu pelupusan permohonan ini;

d) Bahawa kos permohonan ini adalah kos dalam kausa; dan

e) Relif-relif dan/atau perintah-perintah lain yang Mahkamah Yang Mulla ini anggap sesuai dan adil dalam keadaan.

[5] *Rayuan Sivil* No 11–14 of 2008 in the High Court was an appeal from the decision of the Magistrate's Court, Seremban on 21 August 2008 where the wife had applied under s 3 of the Married Woman and Children (Maintenance) Act 1950 for maintenance.

[6] The High Court on 30 January 2009 made the following orders in *Rayuan Sivil* No 11–14 of 2008:

a) Bahawa Pempetisyen membayar Responden nafkah sebanyak RM2,000.00 sebulan berkuatkuasa dari bulan Mac 2009; dan

b) Tunggakkan nafkah RM25,000.00 hendaklah dibayar dalam lima (5) ansuran iaitu RM5,000.00 setiap bulan bermuladari 15.2.2009.

[7] Meantime on 13 January 2009, the husband filed a divorce petition. In

that petition he had also applied under s 83 of the Law Reform (Marriage and Divorce) Act 1976 to set aside or at least reduce the order of maintenance made by the High Court in *Rayuan Sivil* No 11–14 of 2008. That petition was struck out and with it his application to set aside or reduce the order of maintenance made under s 3 of the Married Woman and Children (Maintenance) Act 1950.

[8] On 27 July 2009, the husband applied again for the same orders under s 83 of the Law Reform (Marriage and Divorce) Act. At the end of the hearing, the High Court made the order set out in para 4 above, having found as follows:

> 31. Berdasarkan fakta dan bukti yang dikemukakan oleh pempetisyen, saya merumuskan bahawa terdapat unsur-unsur salah nyata pendapatan dan perbelanjaan responden yang mewajarkan perintah bertarikh 30 Januari 2009 diubah. Justeru membenarkan permohonan pempetisyen di Lampiran 4 dengan kos RM1,000.00.

[9] The objection was made before the High Court that the application under s 83 of the Law Reform (Marriage and Divorce) Act was an abuse of process as it sought to set aside or reduce an order of maintenance made under s 3 of the Married Woman and Children (Maintenance) Act which has its own provisions for variations. Further, to allow the application in this case would amount to allowing a party to reopen or to seek a review of a decision that has already been made under the Married Woman and Children (Maintenance) Act.

[10] The grounds of judgment of the High Court show that the issue was considered. Although the two cases referred to by the learned judge, *Nau Chu Chiong @ Nau Choo Chiong v Lina Soo* [2008] 3 MLJ 42 and *Gisela Gertrud Abe v Tan Wee Kiat* [1986] 2 MLJ 297; [1986] CLJ (Rep) 133, do not have a similar fact matrix of an application under s 83 to vary a maintenance order under another legislation, para 21 of the grounds of judgment shows that the learned judge took into consideration the fact there was Divorce Petition No 33–244 of 2009 which remains pending even at the hearing of this appeal.

[11] Since there was a petition for divorce, s 83 of the Law Reform (Marriage and Divorce) Act, which provides that the court may at any time and from time to time vary or rescind, any subsisting order for maintenance … where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances would apply.

[12] In our view, whether a law ought to be read restrictively or liberally must take into consideration the subject matter and its circumstances. An application for maintenance is made by one who is entitled to and needs financial support in the form of maintenance. An application for variation of a

maintenance order is made by one whose circumstances have changed or there has been a misrepresentation of fact. Such applications are made by spouses. They are individuals, persons and not businesses. A strict application of the law, that since the maintenance order had been obtained under the Married Woman and Children (Maintenance) Act, a setting aside or variation can only be made under same Act, and not under Law Reform (Marriage and Divorce) Act even though there is a divorce petition pending, exposes such persons, imposes upon such persons unnecessary technicalities that only provide fodder for the lawyers whilst making no contribution to the merits of such application. In such cases, a more liberal application is to be preferred, to facilitate justice rather than handicap it. This is particularly so when the reference to order for maintenance in s 83 is not restricted by the Act to orders of maintenance made solely under it.

[13] Paragraphs 23–30 show a meticulous consideration of the income and expenditures of the parties and a full judicial appreciation of those facts.

[14] In the circumstances, we found no error causing such injustice as would demand appellate intervention. Accordingly, we dismissed the appeal with costs.

Mohd Hishamudin JCA (dissenting):

INTRODUCTION

[15] This is an appeal against the decision of the learned High Court judge of Seremban given on 28 June 2011.

[16] The learned High Court judge of Seremban, by his order of 28 June 2011, had, after hearing a notice of application under s 83 of the Law Reform (Marriage and Divorce) Act 1976 ('the Law Reform Marriage and Divorce Act'), varied an earlier order that was made by Azhar Maah J (as he then was) on 30 January 2009.

THE BACKGROUND FACTS

[17] The appellant and respondent were married on 24 January 1999. Due to differences between the couple, the marriage broke down. They had been living apart since November 2007.

[18] They have no children.

[19] On 4 June 2008, the appellant/wife commenced an action against the

respondent/husband under s 3 of the Married Women and Children (Maintenance) Act 1950 ('the Married Women and Children Maintenance Act') at the Seremban Magistrate's Court for maintenance.

[20] Section 3 of the Married Women and Children Maintenance Act) provides:

> 3 Court may make an order for maintenance of wife and children
>
> (1) If any person neglects or refuses to maintain his wife or a legitimate child of his which is unable to maintain itself, a court, upon the proof thereof, may order such person to make a monthly allowance for the maintenance of his wife or such child, in proportion to the means of such person, as the court seems reasonable.

[21] The respondent/husband opposed the application. The parties filed their respective affidavits.

[22] The appellant/wife is an executive officer with RHB Bank, at the Bangi branch, earning a monthly salary of RM5,000. In her affidavits at the maintenance proceeding before the magistrate's court she stated that her monthly take home pay was only RM1,748.25. She claimed that her total monthly expenses to be RM6,356 (in her affidavits she listed 16 items of living expenses). She also claimed that after the marriage the respondent/husband had been maintaining her until 1 January 2007. She alleged that the respondent/husband left the matrimonial home on 3 November 2007.

[23] The respondent/husband is a gynaecological oncologist at the Kuala Lumpur Hospital with a monthly salary of RM9,764.30. He also did part-time work (locum) at the Nilai Cancer Hospital and earned about RM2,700 per month. In his affidavit at the maintenance proceeding before the magistrate's court, he denied ever maintaining the appellant/wife since marriage.

[24] After hearing the application, the learned magistrate made a maintenance order on 21 August 2008. The learned magistrate ordered the respondent/husband to pay maintenance to the appellant/wife in the sum of RM3,700 per month, with effect from the date of the order. The learned magistrate also ordered the respondent/husband to pay the appellant/wife arrears of maintenance payments of RM3,700 per month with effect from 1 January 2007 up to the date of the order.

[25] Now, under s 6 of the Married Women and Children Maintenance Act) there is a provision that states:

A 6 Rescission and variation order

(1) On the application of any person receiving or ordered to pay a monthly allowance under this Act, and on proof of a change of circumstances, his wife or child, or for other good cause being shown to the satisfaction of the court, the court by which such order was made, may rescind the order or may vary it as it seems reasonable.

B

[26] After the issuance of the order for maintenance by the magistrate's court on 21 August 2008, there was no complaint by the respondent/husband to the effect that there had been a material misrepresentation of fact by the appellant/wife when she made the application for the maintenance before the magistrate's court. There was no application made to the magistrate's court pursuant to this s 6 by the respondent/husband for a rescission of the maintenance order or for variation of the same by reason of misrepresentation.

C

D

[27] Instead, what the respondent/husband did was that he appealed against the maintenance order made by the magistrate's court.

[28] The appeal was heard at the Seremban High Court before Azhar Maah J (as he then was). On 30 January 2009, the then learned High Court judge, after hearing the appeal, reduced the monthly maintenance payment from RM3,700 per month to RM2,000 per month. However, the learned judge also ordered the respondent/husband to pay to the appellant/wife arrears of maintenance payments in the sum of RM25,000 on an instalment basis of RM5,000 per month.

E

F

[29] The respondent/husband did not appeal to the Court of Appeal against that decision.

G

[30] Some six months later, on 27 July 2009, the respondent/husband filed a divorce petition against the appellant/wife seeking for a dissolution of the marriage.

H

[31] On the same day, the respondent/husband filed an application pursuant to s 83 of the Law Reform Marriage and Divorce Act seeking for a variation of the High Court order of 30 January 2009 alleging that there had been a misrepresentation of facts on the part of the appellant/wife when making the application for maintenance before the magistrate's court on 4 June 2008.

I

[32] The respondent/husband alleged that there was misrepresentation on the part of the appellant wife when she stated in her affidavits before the magistrate's court:

(a) that her monthly take home pay was only RM1,748.25; and

(b) that the respondent/husband maintained appellant/wife throughout the period when they were living together.

[33] Now, s 83 of the Law Reform Marriage and Divorce Act provides:

> 83 Power of court to vary orders for maintenance
>
> The court may at any time and from time to time vary, or rescind, any subsisting order for maintenance, whether secured or unsecured, on the application of the person in whose favour or of the person against whom the order was made, or, in respect of secured maintenance, of the legal personal representatives of the latter, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in circumstances.

[34] The learned judge of the High Court of Seremban on 28 June 2011 ruled that he had the power to vary the maintenance order pursuant to s 83 of the Law Reform Marriage and Divorce Act notwithstanding the fact that the maintenance orders made by the magistrate's court and by Azhar Maah J were made under the Married Women and Children Maintenance Act.

[35] The learned High Court judge also made a finding of fact that there were misrepresentations made by the appellant/wife at the maintenance proceeding before the magistrate's court. However, the learned judge did not explain what the misrepresentations were.

[36] Accordingly the learned High Court judge allowed the respondent's/husband's application made pursuant to s 83 of the Law Reform Marriage and Divorce Act, and he varied the order of the High Court (made by Azhar Maah J) that was made on 30 January 2009. However, the order made by the learned High Court judge is rather peculiar in that in the purported 'varying' of the order of 30 January 2009, the order of 28 June 2011 does not state in what manner the previous order is to be varied. All that the order states:

> MAKA ADALAH DIPERINTAHKAN bahawa menurut Seksyen 83 Akta Membaharui Undang-Undang (Perkahwinan dan Penceraian) 1976 bahawa Perintah bertarikh 30.1.2009 oleh Mahkamah Tinggi Malaya di Seremban di bawah Rayuan Sivil No. 11-14-2008 diubahkan setakat mana pembayaran nafkah kepada Responden dikurangkan kepada suatu jumlah yang dianggap adil dan berpatutan oleh Mahkamah yang Mulia ini;

[37] The appellant/wife aggrieved by the above order appeal to the Court of Appeal.

THE APPELLANT'S ARGUMENT

[38] The position taken by the appellant/wife is that after the decision of the

High Court of 30 January 2009 (the decision of Azhar Maah J), the respondent/husband should have appealed to the Court of Appeal, if he was dissatisfied with that decision. And since he had not appealed to the Court of Appeal, the matter is now res judicata.

[39] The appellant/wife further argues that the High Court has no power to vary the earlier order of the High Court pursuant to s 83 of the Law Reform Marriage and Divorce Act, since the magistrate's court order (as well as the order of Azhar Maah J) was made pursuant to a different legislation, namely, s 3 of the Married Women and Children Maintenance Act). Any application to vary that earlier order by reason of (alleged) misrepresentation must be made under s 6 of the Married Women and Children Maintenance Act).

[40] The appellant/wife also submits that in any event there is no new evidence adduced by the respondent/husband to show that there had been a misrepresentation of facts by the appellant/wife at the maintenance proceeding before the magistrate's court, and that the issues now raised by the respondent/husband in his s 83 application are not new issues but are issues that had already been ventilated before the magistrate's court during the maintenance proceeding.

DECISION OF THIS COURT

[41] By a majority decision, this court dismissed the appellant's/wife's appeal with cost.

[42] I dissented.

[43] I am allowing the appeal with costs.

REASONS FOR MY DISSENTING JUDGMENT

[44] The following are my reasons.

[45] At the outset I wish to state here that I accept the contention by the respondent/husband that under s 83 of the Law Reform Marriage and Divorce Act the learned High Court judge legally had the power to vary the previous maintenance orders of the magistrate's court and that of Azhar Maah J although those orders were made under a different legislation, namely, the Married Women and Children Maintenance Act. I so hold by reason of the words 'any subsisting order for maintenance' appearing in s 83. In my judgment, it is reasonable to interpret these words to include any maintenance

order made under the Married Women and Children Maintenance Act that was subsisting at the time the application under s 83 was made.

[46] Be that as it may, in my judgment, in the circumstances of the present case, the exercise of that power is improper.

[47] Firstly, as I have just pointed out above, the order of the High Court of 28 June 2011 is vague. The order of the High Court cannot merely states:

> diubahkan setakat mana pembayaran nafkah kepada Responden dikurangkan kepada suatu jumlah yang dianggap adil dan berpatutan oleh Mahkamah yang Mulia ini;

[48] The order of the High Court should have been specific, it must state in what manner the previous order (of 30 January 2009) is to be varied. In other words, the matter should not have been left hanging. On this ground alone it is sufficient for me to allow the appeal.

[49] Further, in my judgment, if the respondent/husband is dissatisfied with the decision of the High Court of 30 January 2009, the proper course of action opened to him is to appeal to the Court of Appeal and not to file an application pursuant to s 83 of the Law Reform Marriage and Divorce Act. This is because I notice from the respondent's/husband's affidavit in support of his s 83 application, the issues that he raises are nothing new: they had already been raised by the parties and ventilated before the magistrate's court in the maintenance proceeding. There cannot now be a reopening of the same issues by the respondent/husband by invoking s 83 of the Law Reform Marriage and Divorce Act. That would be an abuse of the process of the court. I accept the argument of learned counsel for the appellant/wife that what the respondent/husband is doing, in making the application to vary the High Court order of 30 January 2009, purportedly by invoking s 83 of the Law Reform Marriage and Divorce Act, is against the principle of res judicata.

[50] I should also add that if the respondent/husband takes the position that there was in fact a misrepresentation of facts made by the appellant/wife at the maintenance proceeding before the magistrate's court, then, since the magistrate's court order was made pursuant to s 3 of the Married Women and Children Maintenance Act), any application to vary that order by reason of misrepresentation, must be made as soon as possible under s 6 of the same Act. The respondent/husband should not have waited for several months to pass, should not have waited until he filed his divorce petition, and only then to invoke s 83 of the Law Reform Marriage and Divorce Act. Indeed, it is significant to note that there is nothing in the respondent's/husband's supporting affidavit (under the application for ancillary relief pursuant to the

divorce petition) to show that the application now made pursuant to s 83 was motivated by recent discovery of new evidence that was not available earlier despite reasonable diligence. In fact, the respondent/husband, in making his application purportedly under s 83, is essentially still relying on the same documentary evidence that parties relied upon at the magistrate's court. And there is no explanation proffered by the respondent/husband as to why his application to vary by reason of misrepresentation could not have been made earlier pursuant to s 6 of the Married Women and Children Maintenance Act). In my view, a fair inference that can be made here is that this long and unexplained delayed application, purportedly made pursuant to s 83 of the Law Reform Marriage and Divorce Act, is not bona fide.

[51] Appeal allowed with cost.

Appeal dismissed with costs.

Reported by Kohila Nesan